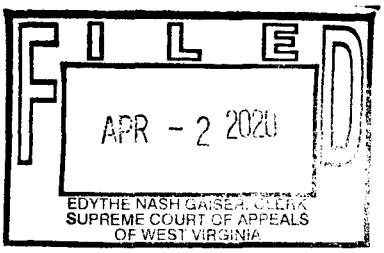
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
Docket No. 19-1037

ROBERT NELSON RECTOR,
Resident of Harrison County,
West Virginia

Petitioner/Appellant,



v.

KIMBERLY KAY ROSS, formerly known As KIMBERLY KAY RECTOR, JACLYN BELCASTRO, as power of attorney for Kimberly Kay Ross, THOMAS G. DYER, and THE HONORABLE LORI B. JACKSON,

Respondents/Appellees.

RESPONSE BRIEF OF APPELLEE JUDGE JACKSON

Submitted By:

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I. STATEMENT OF THE CASE

A. Relevant Factual Background and Procedural History From Underlying Cases.

Appellant Rector, by counsel, has appealed two rulings in this case. First, he has appealed the imposition of sanctions against his attorney that were imposed by the circuit court. Secondly, he has appealed the dismissal of his petition for a writ of prohibition against the family court judge who was conducting post-decree contempt proceedings in his divorce case.

Specifically, this appeal arises from an *Order Granting Judgment and Dismissing Petition for Writ of Prohibition* (App., pp. 486-490), which was entered on October 16, 2019. In the order, the circuit court reduced a previously imposed monetary sanction against Appellant Rector's counsel to a judgment in favor of the State of West Virginia. Also, the circuit court dismissed Count IV of the *Amended Complaint for Declaratory Relief, Writ of Prohibition and Other Relief* (hereinafter "amended complaint" or "petition for writ of prohibition") which was a petition for a writ of prohibition against Appellee, the Honorable Lori B. Jackson (hereinafter "Appellee Judge Jackson"), a Harrison County Family Court Judge. Appellant Robert Nelson Rector (hereinafter "Appellant Rector") had included the petition for writ of prohibition in the complaint (both original and amended) to prevent Appellee Judge Jackson from conducting post-decree contempt proceedings.

Some unique facts with regard to the parties in the proceedings below are included to provide necessary factual background. It should be noted, however, that these initial facts are not relevant to the appellate issues because the issues do not relate to the primary subject matter of the complaint. In addition, there are three other

underlying cases that have not been appealed, but proceedings in them are important to an understanding of this case. The three cases are a divorce case: *In re the Marriage of: Robert Nelson Rector v. Kimberly Kay Rector (Now "Ross")*, Case No. 15-D-497-5, Harrison County Family Court; a criminal case styled: *State of West Virginia v. Kimberly Kay Rector*, Case No. 15-F-80, Taylor County Circuit Court; and *Robert Nelson Rector v. Kimberly Kay Rector and State Farm Fire and Casualty Company*, Civil Action No. 15-C-491-2, Harrison County Circuit Court.

Appellant Rector was married to Defendant Kimberly Kay Ross (f/k/a Kimberly Kay Rector). It is undisputed that Ms. Ross shot Appellant Rector while she was married to him and was later convicted of wanton endangerment with a firearm for the shooting in the Taylor County Circuit Court criminal case. (App., p. 221). As part of the sentencing order, restitution was awarded against Ms. Ross and in favor of Appellant Rector. (App., p. 5). During her criminal case, Attorney Thomas G. Dyer, a defendant in the case below, represented Ms. Ross. Ultimately, Attorney Dyer advanced claims for attorney fees for his representation of her through an attorney charging lien, and his claim necessitated that he be joined as a party to the instant interpleader case. (App., p. 6).

As noted above, Appellant Rector filed a divorce case against Ms. Ross. Appellee Judge Jackson presided over the divorce case and post-decree contempt proceedings. (App., p. 4). Since Ms. Ross was incarcerated a guardian *ad litem*, Attorney Aimee Goddard, was appointed to represent her, and her representation continued throughout the post-decree contempt proceedings. Through his petition for a writ of prohibition, Appellant Rector sought to prohibit Appellee Judge Jackson from

conducting the post-decree contempt proceedings after he and his counsel, Attorney Gregory Schillace, failed to appear at a hearing scheduled for May 2, 2017, at 7:00 a.m.

A brief summary of the divorce and post-decree proceedings follows. On December 21, 2016, Appellee Judge Jackson issued a *Decree of Divorce*. (App., pp. 399-409). According to the *Decree of Divorce*, Ms. Ross was to receive identified items of property, which were found to be her separate property. On January 23, 2017, Appellant Rector filed an appeal of the *Decree of Divorce* in circuit court. It should be noted that Appellant Rector did not challenge any ruling associated with the items of personal property on appeal.

On February 24, 2017, the guardian *ad litem* for Ms. Ross filed a petition for contempt in an attempt to compel Appellant Rector to provide Ms. Ross' family with her separate property. (App., p. 52). She filed a supplemental petition for contempt on April 12, 2017. (App., p. 52). After reviewing the contempt petitions, Appellee Judge Jackson issued a rule to show cause and set a hearing for May 1, 2017, at 9:00 a.m. (App., p. 52).

On April 24, 2017, the circuit court affirmed the *Decree of Divorce*. On April 28, 2017, Appellant Rector filed a motion for stay in circuit court with respect to the *Decree of Divorce*. At the time he filed the motion for a stay, he had not yet filed a petition for appeal in the West Virginia Supreme Court.

On May 1, 2017, Appellee Judge Jackson began a hearing on the guardian *ad litem's* contempt petition that related solely to Ms. Ross' separate property, and it did not involve any of the issues that had been appealed. Appellant Rector, Attorney Schillace, and Attorney Goddard were present for the 9:00 a.m. hearing. At this hearing,

Appellant Rector argued that Appellee Judge Jackson did not have jurisdiction because the contempt petitions had never been verified by Ms. Ross. (App., pp. 11, 279, 311; S. App., p.1). Apparently, Attorney Schillace had waived the verification requirement during the divorce case because of the inconvenience of Ms. Ross' incarceration. Because the hearing could not be concluded in the scheduled time frame, Appellee Judge Jackson scheduled additional time for the hearing on May 2, 2017, at 7:00 a.m. This time was scheduled with the knowledge of both Appellant Rector and his counsel.

Later that same day, the Harrison County Circuit Court signed an *Order Granting Stay of the Petitioner Pending Appeal.* (App., pp. 333-334). Appellant Rector's counsel, Attorney Schillace, prepared the order. The order did not address whether the entire order or whether only parts of it were stayed. It did not reference the contempt petitions, nor did it address Ms. Ross' separate property. The order indicated that the stay would be extended upon the filing of a notice of appeal. Appellee Judge Jackson received a copy of the *Order Granting Stay of the Plaintiff Pending Appeal* by facsimile on the afternoon of May 1, 2017. (App., p. 113).

The following morning, on May 2, 2017, Appellee Judge Jackson convened a hearing on the contempt petitions at 7:00 a.m. The guardian *ad litem* for Ms. Ross was present. Neither Appellant Rector, nor his counsel appeared. Neither notified the Family Court of Harrison County that they were not coming to the hearing. The family court's findings were memorialized in an order entered on May 11, 2017. (App., pp. 114-115). In the order, the family court scheduled another hearing for June 2, 2017, at 1:00 p.m. *Id.* It is Appellant Rector's position that he had no duty to appear because of

the *Order Granting Stay of the Petitioner Pending Appeal*. Two days later, on May 4, 2017, Appellant Rector filed a notice of appeal in his divorce case in this Court.

On June 2, 2017, the Harrison County Circuit Court conducted a hearing on Appellant Rector's previously filed *Motion to Enforce Stay and Request for Expedited Relief*. By written order entered June 2, 2017, the Harrison County Circuit Court found that the only matter that could not be stayed were child support or spousal support and that the contempt matter did not involve child support or spousal support. (See *Order Granting Motion to Enforce Stay and Clarification of May 1, 2017 Order Granting Stay of the Petitioner Pending Appeal*, Circuit Court of Harrison County, 15-D-497-5 (App., pp. 414-421)). Therefore, the circuit court found that all proceedings in the Harrison County Family Court case were stayed. The circuit court further ordered that the family court hearings scheduled for June 2, 2017 and June 14, 2017, were cancelled. In its order that clarified the terms of the stay, the circuit court found that the Harrison County Family Court had no jurisdiction to entertain a contempt petition against Appellant Rector or his Attorney Gregory Schillace. (App., p. 419). In this order, the circuit court expressly stated that: "This Court makes no finding that the Family Court Judge violated the May 1, 2017 Order due to the lack of clarity in that Order." (App., p. 419). This order was prepared by Appellant's counsel.

In August of 2017, Ms. Ross and Appellant Rector signed a *Release and Settlement Agreement* that expressly stated that the parties were settling all outstanding matters between them that arose in the divorce case, the criminal case, and the initial civil case against Ms. Ross and State Farm Insurance Company. (App., pp. 17-26). The agreement contemplated that Ms. Ross (in actuality her family) would remove all

items of her personal property from Appellant Rector's residence. (App., pp. 22-23). This agreement was not dependent upon payment of any amount by Ms. Ross to Appellant Rector.

On August 28, 2017, Appellant Rector, by counsel, moved to voluntarily dismiss his appeal of the divorce case. By order, this Court dismissed the appeal. (App., p. 116). After the appeal was dismissed, Appellee Judge Jackson entered an order scheduling a hearing on its previously issued rule to show cause against Appellant Rector. (App., p. 117). Since the appeal of the *Decree of Divorce* was dismissed, the stay was no longer in effect.

As part of her continued representation of Ms. Ross, Attorney Goddard filed a *Petition to Ratify and Enforce Release and Settlement Agreement,* in the Harrison County Family Court on September 21, 2017. (App., p. 11). Apparently, Ms. Ross had not received her separate property. The matter was set for hearing on November 9, 2017.

B. Procedural History in the Case Below.

To resolve the issues raised in the three different cases, Appellant Rector filed the instant case as an interpleader action on November 3, 2017, and he included the written settlement agreement as Exhibit A to the original complaint. (App., pp. 17-26). One purpose of the interpleader action was to resolve the claims arising from the divorce case, the criminal case, and the civil case. The second purpose was to challenge the post-decree proceedings in the Harrison County Family Court, specifically the *Petition to Ratify and Enforce Release and Settlement Agreement* scheduled for hearing on November 9, 2017. To challenge the post-decree proceedings, Appellant

Rector included a petition for writ of prohibition as Count IV of the original complaint. (App., pp. 11-12). He specifically sought to challenge the Harrison County Family Court from conducting the hearing on November 9, 2017. A writ of prohibition was not issued before the November 9, 2017 hearing, and Appellee Judge Jackson conducted the hearing. Appellee Judge Jackson ultimately found that the Harrison County Family Court did not have jurisdiction to address the settlement agreement. (App., p. 51). However, she issued a rule to show cause against Appellant Rector and his counsel for their failure to appear for the May 2, 2017 hearing. *Id.*

Next, Appellant Rector filed an *Amended Complaint for Declaratory Relief, Writ of Prohibition and Other Relief.* (App., pp. 42-60). The petition for writ of prohibition was filed because Appellee Judge Jackson also entered an *Order Issuing Rule to Show Cause and Setting Hearing*, in the family court case, against Appellant Rector and Attorney Schillace for their failure to appear at the May 2, 2017 hearing. (App., p. 51). The hearing was scheduled for December 11, 2017, at 10:00 a.m. (App., p. 62).

On December 6, 2017, the circuit court entered an *Order Scheduling Hearing Regarding Issuance of Rule to Show Cause* in the instant case and set the hearing for December 11, 2017, at 9:30 a.m., which was immediately before the hearing scheduled by Appellee Judge Jackson. (App., pp. 69-72). The order noted that Appellee Judge Jackson had not been served with a copy of the summons and amended complaint. The order specified that the parties were required to appear, either in person or by counsel at the hearing scheduled for December 11, 2017. *Id.*

On December 11, 2017, the circuit court conducted a hearing on the issues in the *Order Scheduling Hearing Regarding Issuance of Rule to Show Cause*. Appellee Judge

Jackson appeared not in person, but by her counsel, Attorney John Hedges. Attorney Schillace appeared on behalf of Appellant Rector, and Attorney Goddard appeared as guardian *ad litem* on behalf of Ms. Ross. A transcript of this hearing is included in the record. (App., pp. 262-317).

At the December 11, 2017 hearing, the circuit court noted that the amended complaint had been filed, but had not been served on Appellee Judge Jackson. (App., p. 265-269). The circuit court found that the pre-suit notice provisions found in West Virginia Code §§ 55-17-1, *et seq.* did not apply to cases involving petitions for an extraordinary remedy. (App., pp. 272, 301). The circuit court set a 30-day time period for Appellee Judge Jackson to respond to the amended complaint after proper service. (App., p. 302). The circuit court scheduled another hearing for February 28, 2018. (App., p. 305). It further directed Attorney Schillace to prepare an order from the December 11, 2017 hearing. (App., p. 305).[1]

Although Appellee Judge Jackson was not served with a copy of the summons and amended complaint before the next hearing, she filed a *Motion to Dismiss Count IV of the Amended Complaint for Declaratory Relief, Writ of Prohibition and Other Relief* (App., pp. 91-94) and a supporting memorandum of law (App., pp. 95-131) before the hearing was convened. As a basis for the motion to dismiss, Appellee Judge Jackson argued that West Virginia Code § 51-2A-9(a) authorized her to conduct contempt proceedings. In addition, she argued that West Virginia Code § 51-2A-7(a) granted her

[1] As discussed later in this brief, Attorney Schillace did not submit a proposed order to the court until October 29, 2018. Undersigned counsel objected to the proposed order and requested leave to file a proposed order. (App., pp. 259-261). Because of the passage of time, undersigned counsel was not certain that specific findings included in Appellant Rector's proposed order were, in fact, made by the circuit court. Ultimately, the circuit court signed the proposed order submitted by undersigned counsel. (App., pp. 357-360).

the authority to address Appellant Rector and his counsel's failure to appear at the May 2, 2017 hearing. Further, she argued that any harm to Appellant Rector could be addressed on appeal, so he was not entitled to a writ of prohibition.

On February 28, 2018, the circuit court convened the previously scheduled hearing. Neither the Appellant Rector, nor his counsel appeared. (App., p. 132). Nor did Attorney Dyer appear. (App., p. 132). Although the circuit court heard argument on the motion to dismiss submitted on Appellee Judge Jackson's behalf, it did not rule on it. (App., p. 133). However, the circuit court did note some concerns that it had with regard to the case. First, it expressed concern that Appellee Judge Jackson had issued a rule to show cause against Appellant Rector and his counsel even though a stay had been entered. Next, the circuit court noted that Attorney Dyer's use of an attorney charging lien may have been improper. (App., p. 133). Finally, the circuit court noted its concern with Attorney Schillace's failure to appear, his failure to serve the amended complaint, and his failure to prepare the order from the December 11, 2017 hearing. (App., p. 133).

To address its concerns, the circuit court scheduled a hearing for March 30, 2018, and issued a rule to show cause against Attorney Schillace to show why he should not be held in contempt. (App., p. 133). The circuit court also issued a rule to show cause against Attorney Dyer to show cause why he did not appear at the hearing and why he should not be sanctioned for the improper use of an attorney's charging lien. (App., pp. 133-134). The proceedings were memorialized in an *Order Scheduling Further Hearing and Issuing Rule to Show Cause* entered on March 20, 2018, and the order was to be personally served on Attorneys Schillace and Dyer. (App., pp. 132-

135). The day before the next scheduled hearing, on March 29, 2018, Appellant Rector filed a response to the motion to dismiss. (App., pp. 136-146).

On March 30, 2018, the circuit court convened the hearing, and a transcript of the hearing was prepared afterwards. (App., pp. 498-547). During the hearing, the court indicated that it had previously warned Attorney Schillace in another case that it would impose a $5,000.00 sanction against him should circumstances warrant. (App., p. 540). Specifically, the circuit court noted that Attorney Schillace had failed to serve Appellee Judge Jackson even though the circuit court had ordered him to do so, that he had failed to appear for the February 28, 2018 hearing, and that he had failed to prepare an order from the December 11, 2017 hearing. (App., p. 540).

The court further addressed concerns it had with regard to Attorney Schillace's conduct in seven other cases before it and described the problematic conduct. The concerns included an attempt to continue a final pretrial conference in *Harper Lumber Building Supply v. Rulin Construction*, Case No. 16-C-251, Harrison County Circuit Court, because it had not been mediated. (App., p. 540; S. App., p. 4). In a second case, *Beverly Hill Masonry, LLC v. Thompson*, Civil Action No. 15-C-15-3, Harrison County Circuit Court, the court noted that Attorney Schillace had not signed a release even though the court had ordered him to do so. (App., pp. 540-541; S. App., p. 4-5). Apparently, defense counsel had to schedule a hearing before Attorney Schillace signed the release. *Id.*

In a third case, *Marks v. Pritt*, Civil Action No. 16-C-244, Harrison County Circuit Court, it was noted that Attorney Schillace did not file a response to a summary judgment motion. (App., p. 541; S. App., p. 5). In a fourth case, *McKibben v. DePolo*,

Civil Action No. 17-C-225, Harrison County Circuit Court, the court found that Attorney Schillace had not signed an order withdrawing as counsel. (App., p. 541, S. App., p. 5).

In a fifth case, *Bear Paw Company, LLC v. Dearth*, Civil Action No. 17-C-70-3, Harrison County Circuit Court, the court recounted that the pretrial conference had to be cancelled, that opposing counsel believed that the case had been resolved, and that Attorney Schillace had not filed a response to the summary judgment motion. (App., p. 541; S. App., p. 5). In yet another case, *Hooshyar v. Hartnett*, Case No. 16-C-311-3, Harrison County Circuit Court, the court observed that Attorney Schillace had sent his associate to a final pretrial conference. (App., p. 541; S. App., p. 5). Once it was rescheduled, Attorney Schillace claimed that he had not mediated the case because the opposing party was *pro se*. However, the court found that the mediation deadline had expired before opposing counsel had withdrawn. *Id.* Finally, the court indicated that a hearing in a seventh case, a criminal case, *State v. Susan Owens*, Case No. 17-F-221, Harrison County Circuit Court, had to be rescheduled because Attorney Schillace's associate had covered the hearing and she does not do any criminal work. (App., pp. 541-542; S. App., p. 5).

After noting Attorney Schillace's lack of professional conduct, the court ordered him to deposit the sum of Five Thousand Dollars ($5,000.00) with the Harrison County Circuit Clerk's Office by April 6, 2018. (App. p. 544). It further ordered that a transcript be prepared, and that it would be sent to the Office of Disciplinary Counsel. (App., p. 543). Appellee Judge Jackson renewed her motion to dismiss, but the circuit court denied it. Specifically, the circuit court indicated that it was denying the motion to dismiss "at this time." (App., p. 545).

The docket sheet from the underlying case indicates that Appellant Rector, by counsel, filed a *Motion to Rulings of the Court Announced During March 30, 2018 Hearing* pursuant to Rule 60(b)(6) of the West Virginia Rules of Civil Procedure on April 9, 2018. (App., pp. 147-150). In this motion, Appellant Rector claimed lack of notice with regard to the sanction imposed and a claim that the court's announcement that a copy of the transcript would be sent to the Office of Disciplinary Counsel violated Rule 2.6 of the West Virginia Rules of Lawyer Disciplinary Procedure. (App., pp. 147-148). The circuit court signed the order from the March 30, 2018 hearing, on June 5, 2018. (S. App., p. 7). Since Appellant Rector's motion was filed after the hearing, a ruling on it was not included in the order that memorialized the March 30, 2018 hearing.

Next, the circuit court set a pretrial scheduling conference for July 13, 2018. (App., p. 157). Before the scheduling conference, Appellant Rector filed a *Motion for Judgment on the Pleadings or in the Alternative Motion for Summary Judgment with Respect to the Defendant, the Honorable Lori B. Jackson* on July 11, 2018. (App., pp. 159-172). By counsel, Appellee Judge Jackson filed a *Response to Motion for Judgment on the Pleadings or in the Alternative Motion for Summary Judgment with Respect to the Defendant, the Honorable Lori B. Jackson and Motion for Summary Judgment Filed on Behalf Defendant Family Court Judge Jackson.* (App., pp. 193-225). Exhibits were attached to the pleading from the divorce case that included the *Order Granting Stay of the Petitioner Pending Appeal* (App., pp. 208-209), the order dismissing the appeal to this Court (App. p. 210), and the *Notice Scheduling Hearing Following Dismissal of Appeal* (App., p. 211). In addition, the *Order Addressing Post-*

Trial Motion (App., pp. 212-225) that finalized the first civil case against Ms. Ross and State Farm Fire and Casualty Company was attached as an exhibit.

In this responsive pleading, Appellee Judge Jackson again requested dismissal and relied on Appellant Rector's failure to follow the pre-suit notice provisions found in West Virginia Code § 55-17-3. In addition, she argued that West Virginia Code §§ 51-2A-7 and -9 confer upon a family court the power and authority to regulate proceedings before it. Further, Appellee Judge Jackson argued that Appellant Rector could appeal any decision that Appellee Judge Jackson rendered after a hearing for their failure to appear and, therefore, relief in prohibition was not warranted. (App., pp. 193-225).

On July 13, 2018, the circuit court first conducted a scheduling conference off the record. An issue came up as to whether the order from the December 11, 2017 hearing had been signed by the court. It should be noted that it was approximately eight months after the date of the December 11, 2017 hearing. After some initial discussion, the circuit court determined it should make a record of the proceeding, and so it began a hearing on the record. (App., p. 241-249). Attorney Schillace indicated that he believed that he had submitted the order to the court on March 28, 2018. (App., p. 243). As proof, he produced an unsigned letter to the court that had the date of March 28, 2018. After questions arose, undersigned counsel produced a letter dated March 28, 2018, from Mr. Schillace to counsel along with a proposed order. (App., p. 173). The circuit court filed the letter sent to undersigned counsel as an exhibit. *Id.* The circuit court expressed its concern that Attorney Schillace was representing that he had delivered a copy of the order to the court two days before the March 30, 2018 hearing, but that this representation did not make sense, given the transcript from the March 30, 2018

hearing. (App., pp. 243-244). The circuit court further expressed its concern that Attorney Schillace had printed off an unsigned letter from his computer that purported that he had submitted a copy to the circuit court on the same day that he had mailed the proposed order to counsel.[2] (App., pp. 244-245).

The submission of the order was not the only concern expressed by the circuit court. The circuit court told Attorney Schillace that he needed to personally come to hearings, as opposed to sending an associate. (App., p. 246). Specifically, the court told Attorney Schillace:

> In the future, you are not to send anyone else to cover any of your hearings from your office. You are to be here personally. There have been too many problems in too many issues when your associate does not know anything at all about a case when she shows up here. So you need to be here on everything. (App., p. 246).

Next, the circuit court inquired whether Attorney Schillace had posted the sanction of $5,000.00. Attorney Schillace indicated that he had not, but that he had filed a motion. (App., p. 246). Attorney Schillace, however, agreed that the order imposing the sanction had not been stayed. He did not describe the sanction as prophylactic in nature, a representation he made later in the case and in this appeal. (App., p. 246).

On October 29, 2018, Attorney Schillace submitted a proposed order from the December 11, 2017 hearing to the circuit court. (S. App., p. 9-13). Undersigned counsel filed an *Objection to Proposed Order and Motion to Prepare Order* on or about October 31, 2018, and noted that the circuit court may not have made the specific

[2] Attorney Schillace did not submit a proposed order to the circuit court for the December 11, 2017 hearing until October 29, 2018, almost eleven months after the hearing. Ultimately, undersigned counsel obtained a transcript of the hearing and submitted an order that was signed by the circuit court. (App., pp. 357-360).

findings which was included in Attorney Schillace's proposed order. (App., pp. 259-261). Ultimately, the circuit court signed the proposed order submitted by undersigned counsel on May 20, 2019. (App., pp. 357-360).

For a period of time, the other parties engaged in discovery. In accordance with the scheduling order, Appellee Judge Jackson filed a *Motion for Summary Judgment and Supporting Memorandum of Law*. (App., pp. 318-351). The grounds for her motion were similar to what she had raised in her motion to dismiss (App., pp. 91-131) and in a response to Appellant Rector's summary judgment motion. (App., pp. 193-225). In this pleading, she also requested bifurcation of any further proceedings involving the petition for writ of prohibition from any trial that might be conducted. (App., pp. 329-330).

On May 28, 2019, Appellant Rector filed a *Response of the Plaintiff to the Motion for Summary Judgment of the Defendant, the Honorable Lori B. Jackson.* (App., pp. 361-376). In this pleading, Appellant Rector argued that the June 2, 2017 circuit court order that clarified the stay had not been appealed. (App., p. 371). He asserted, therefore, that no further action could be taken by the Harrison County Family Court with regard to his failure to appear for the hearing on May 2, 2017.

On June 12, 2019, a *Reply to Response of the Plaintiff to the Motion for Summary Judgment of the Defendant, the Honorable Lori B. Jackson* was filed. (App., pp. 391-438). In this pleading, Appellee Judge Jackson argued that the initial stay granted by the circuit court was unclear and that it was only until the second order of June 2, 2107, did the circuit court make clear that all matters in the family court were stayed. (App., p. 393). Therefore, it was not clear on May 2, 2017, when Attorney Schillace and his counsel failed to appear, that they had been excused from attendance

at the hearing. Secondly, Appellee Judge Jackson argued that the alleged lack of jurisdiction did not excuse their attendance. (App., p. 393). Further, Appellee Judge Jackson argued that she properly scheduled a hearing because a post-decree contempt petition had been filed by the guardian *ad litem* for Ms. Ross. (App., p. 394).

As noted previously, Appellee Judge Jackson had no interest in the issues that arose between the other parties, Appellant Rector, Ms. Ross, Jaclyn Belcastro (power of attorney for Ms. Ross), and Attorney Dyer. After mediating the case, the other parties submitted an *Agreed Order Regarding Interpleader* that was signed by the circuit court on June 24, 2019. (App., pp. 446-448).

On June 27, 2019, the circuit court conducted a final pretrial conference, and the transcript is included in the record. (App., pp. 454-470). At the beginning of the hearing, the circuit court questioned undersigned counsel as to why Appellee Judge Jackson was not present. (App., p. 455). At the hearing, the circuit court also questioned Attorney Schillace as to whether he had paid the sanction and referenced Attorney Schillace's conduct in at least one other case. (App., pp. 456, 458). At this hearing, Attorney Schillace asserted that he believed that the sanction was prophylactic in nature. *Id.* He also asserted that he had previously filed a motion to alter or amend the sanction and that he was not aware that the sanction would be addressed at this hearing. After hearing from Attorney Schillace, the circuit court ordered him to pay the fine by the end of the business day, June 27, 2019. (App., p. 460). The circuit court further informed him that if he failed to do so, an additional penalty of $50.00 per day would be assessed for each day that the Harrison County Circuit Clerk's Office was open until the fine was paid. (App., p. 460).

After the hearing on June 27, 2019, Attorney Schillace filed a *Motion to Alter/Amend Rulings of the Court Announced During June 27, 2019 Hearing; And Motion to Stay to Permit Filing of Petition for Writ of Prohibition.* (App., pp. 450-453). The primary basis for Attorney Schillace's motion was a claim of lack of notice. (App., pp. 450-451). He also claimed that the court's intention to submit a copy of the transcript to the Office of Disciplinary Counsel was a violation of Rule of Professional Conduct 2.6. (App., p. 451).

After the hearing and after it had reviewed Attorney Schillace's motion, the circuit court memorialized its rulings in the *Order From June 27, 2019 Final Pretrial Holding In Abeyance Motion for Summary Judgment, Ordering Attorney for the Plaintiff to Pay the $5000 Sanction By the Close of Business and Ordering Him to Pay a $50 Penalty for Each Business Day Thereafter Up to 30 Days for His Failure to Pay the Same and if the Same Is Not Paid the Court Will Dismiss Count 4 of the Complaint and Schedule Further Hearing* which was entered on August 13, 2019. (App., pp. 467-469). In this order, the court noted that Attorney Schillace had dated his Rule 60(b) motion for April 6, 2018, but it, in fact, had not been filed until April 9, 2018. (App., unnumbered p. 549). In this order, the court found that Attorney Schillace had failed to comply with a prior order of the court, that it should hold any ruling on Attorney Schillace's summary judgment motion in abeyance, that a $50.00 per day additional amount would be imposed, and if the penalty were not paid, that it would dismiss the petition for a writ of prohibition with prejudice. (App., p. 468).

On August 13, 2019, the circuit court issued another order titled *Order Denying Motion to Rulings of the Court Announced During March 30, 2018 Hearing; Motion to*

Alter/Amend Rulings of the Court Announced During June 27, 2019 Hearing and Motion to Stay to Permit Filing of Petition for Writ of Prohibition. (App., pp. 470-477). In its order, the circuit court noted its reliance on *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W. Va. 103, 113, 697 S.E.2d 139, 149 (2010). (App., p. 473). The circuit court also clarified that it had not found Attorney Schillace in contempt when it has originally imposed the sanction, but it imposed the sanction from its inherent power to regulate proceedings before it. The circuit court further clarified that once Attorney Schillace failed to pay the sanction, it found him in civil contempt and his continued failure to pay the sanction warranted the $50.00 per day penalty under *In re Freida Q.,* 230 W. Va. 652, 742 S.E.2d 68 (2013). (App., p. 475).

In the same order, the circuit court also addressed and clarified issues related to *Motion to Rulings of the Court Announced During March 30, 2018 Hearing* filed by Attorney Schillace. (App., p. 475). As an initial matter, the court noted that the motion indicated that it was filed on April 6, 2018, the initial deadline for the sanction, but it was not filed until April 9, 2018. (App., unnumbered p. 549). Specifically, the court noted that Attorney Schillace had not requested a hearing when it was filed. (App., p. 475). Next, Attorney Schillace did not raise the motion again until the July 13, 2018 hearing. *Id.* At that hearing, the circuit court had informed him that a stay of the sanction would not be granted, and a hearing would not be conducted until the sanction was paid. *Id.* The court further noted that Attorney Schillace had claimed that his failure to appear for the February 28, 2018 hearing was because of lack of notice. (App., p. 476). However, Attorney Schillace caused the lack of notice because he did not prepare the order. (App., p. 476). The court further noted that the Rule 60(b) motion did not toll the

running of time to appeal the sanction, and the time for filing a notice of appeal had run out. (App., p. 476). Continuing in this vein, the court found that the *Motion to Alter/Amend Rulings of the Court Announced During the June 27, 2019 Hearing and Motion to Stay to Permit Filing of Petition for Writ of Prohibition* should also be dismissed as moot. (App., p. 476). Finally, the court noted that Attorney Schillace's argument, that the court had wrongfully directed the submission of a hearing transcript to the Office of Disciplinary Counsel, was not correct because no duty of confidentiality was breached by the court's statement. (App., pp. 470-477).

On August 14, 2019, the circuit court convened another hearing, and the transcript of this hearing is included in the record. (App., pp. 480-485). Present at the hearing were Appellant Rector and Attorney Schillace. Also present were undersigned counsel and Appellee Judge Jackson. The court began the hearing with an inquiry to Attorney Schillace as to whether he had deposited the previously ordered sanction. (App., p. 480). When Attorney Schillace indicated that it had not been paid, the court further found that the failure to post the sanction increased the total amount due to Six Thousand Five Hundred Dollars ($6,500.00) and that that amount should be reduced to a judgment in the favor of the State of West Virginia. (App., p. 481).

As for the petition for a writ of prohibition found in Count IV of the amended complaint, the circuit court found that the claim should be dismissed because it was frivolous and that the family court had jurisdiction to address the contempt petition once the appeal was dismissed. (App., p. 482). In addition, the court found that there would be no impediment to Appellee Judge Jackson conducting a hearing or otherwise addressing the rule to show cause that had been previously issued. The circuit court

further found that the writ of prohibition should be dismissed because Attorney Schillace could file an appeal of any ruling issued by Appellee Judge Jackson. (App., p. 482). Therefore, the circuit court found that the petition for writ of prohibition found in Count IV of the original and amended complaints should be dismissed with prejudice. The *Order Granting Judgment and Dismissing of Petition for Writ of Prohibition* was entered on October 16, 2019. (App., pp. 486-490).

At the hearing, the circuit court directed undersigned counsel to file an attorney fee affidavit. (App., p. 486). It later denied an award of attorney fees because a motion and detailed billing statement had not been submitted. (App., pp. 491-497).

Appellant Rector has appealed two issues arising in the case below. First, he claims that the circuit court erred in imposing the sanction of $5,000.00, which was later increased to the amount of $6,500.00. Secondly, he argues that the circuit court erred in dismissing the petition for a writ of prohibition as a sanction. Underlying this argument is the assumption that the case was only dismissed as a sanction, which is not supported by the record. He further asserts that his allegation -- that Appellee Judge Jackson lacked jurisdiction because of the stay -- excuses him and his counsel from not appearing on May 2, 2017. A review of the record and relevant legal authority, however, fails to support Appellant Rector's allegations of error.

II. SUMMARY OF ARGUMENT

Although Appellant Rector has challenged the circuit court's imposition of sanctions against Attorney Schillace, the record below indicates that the circuit court acted pursuant to its inherent authority to sanction his misconduct in both the instant case and seven other cases before it. Additionally, it provided proper notice to

Appellant Rector and his counsel throughout the underlying proceedings. With regard to the dismissal of the petition for writ of prohibition, the circuit court provided approximately a six-week notice to Appellant Rector and Attorney Schillace that it would consider dismissal if the monetary sanction was not paid or stayed by this Court. When the circuit court dismissed the petition for a writ of prohibition, it did so on the merits as well as for a sanction. Therefore, the circuit court did not err with regard to the dismissal of the petition for a writ of prohibition.

Appellant Rector has alleged that Appellee Judge Jackson lacked jurisdiction to address his and his attorney's unilateral decision not to attend the hearing on May 2, 2017, because an order staying the divorce decree had been entered by the circuit court. It is undisputed that the order did not specifically address the contempt petition, and it had to be clarified by a second order to reach this conclusion. Notwithstanding Appellant Rector's allegation of lack of jurisdiction, Appellee Judge Jackson had jurisdiction to address the contempt petition because it involved the enforcement of the *Decree of Divorce*, not the modification of it. Even if Appellee Judge Jackson did not have jurisdiction because of the stay entered by the circuit court, the first place that Appellant Rector should have challenged jurisdiction was before Appellee Judge Jackson. Appellant Rector's decision and his attorney's decision to not appear is a matter that was properly before Appellee Judge Jackson pursuant to the relevant statutes that grant family courts the authority to manage the proceedings before them.

III. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a) of the Rules of Appellate Procedure, the facts and legal arguments are adequately presented in the briefs and in the record on appeal, and the

decisional process would not be significantly aided by oral argument. Should this Court determine that oral argument would aid in the resolution of this case, oral argument pursuant to Rule 19 of the Rules of Appellate Procedure would be appropriate.

IV. ARGUMENT OF LAW

A. Standard of Review

With regard to the imposition of sanctions, this Court has established that:

> Mindful that case management is a fact-specific matter within the ken of the trial court, reviewing courts have reversed only for a clear abuse of discretion. A trial court's factual findings may not be set aside unless they are clearly erroneous. In particular, a trial court's credibility determinations are entitled to special deference. *Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996).

Succinctly stated, this Court has recognized that: "This Court reviews a trial court's assessment of sanctions under an abuse of discretion standard." *Davis v. Wallace*, 211 W. Va. 264, 266, 565 S.E.2d 386, 388 (2002).

B. The Circuit Court Acted Within Its Inherent Power to Sanction Attorney Schillace for His Repeated Instances of Misconduct.

This Court has recognized that a circuit court has the inherent power to sanction an attorney for his or her misconduct during the litigation process. Syl. Pts. 3 through 7, *State ex rel. Richmond Am. Homes of W. Va. v. Sanders*, 226 W. Va. 103, 697 S.E.2d 139. Specifically, this Court has recognized that Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not establish a particular procedure for a circuit court to impose a sanction. See Syl. Pt. 5, *Richmond Am. Homes*, 226 W. Va. 103, 697 S.E.2d 139 (quoting Syl. Pt. 1, *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827). However, "a court must ensure any sanction imposed is fashioned to address the identified harm cause by the party's misconduct." *Id.*

In *Richmond Am. Homes*, a group of plaintiffs in three consolidated cases had sued eight defendants for problems with radon systems in newly constructed homes. During the litigation, the president of one of the corporate defendants directly contacted some of the plaintiff-homeowners over their attorneys' objections. In addition, there was an allegation that the defendants engaged in discovery misconduct and that a defense attorney discussed potential employment options with plaintiffs' counsel during a settlement conference. Based upon these findings, the circuit court granted the plaintiffs' motions for default judgments and struck the answers of the defendants as the sanction. In response, Defendant Richmond sought a writ of prohibition to challenge the two orders that imposed the sanctions.

As a starting point, this Court discussed the well-established principle that a circuit court has the inherent power to sanction misconduct in a case even when there is not a specific rule or statute that governs the misconduct. *Richmond Am. Homes*, 226 W. Va. 103, 111, 697 S.E.2d 139, 147 (citing *Shields v. Romine*, 122 W. Va. 639, 13 S.E.2d 16 (1940)). After establishing this general principle, this Court held that:

> [I]mposition of sanctions and dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party. Syl. Pt. 7, *Richmond Am. Homes*, 226 W. Va. 103, 697 S.E.2d 139.

After this Court established the standard for imposing sanctions, it reviewed the record in the case below. This Court concluded that the circuit court did not make findings sufficient to determine that default judgments should be awarded. *Richmond Am. Homes*, 226 W. Va. at 113, 697 S.E.2d at 149. Therefore, this Court vacated the

two circuit court orders and authorized the circuit court to determine whether the identified misconduct warranted the entry of default. *Richmond Am. Homes*, 226 W. Va. at 114, 697 S.E.2d at 150. Nevertheless, this Court upheld the general principle -- that a circuit court may sanction parties or attorneys for litigation misconduct apart from a specified rule, and such a sanction may include a default judgment. Syl. Pt. 4, *Richmond Am. Homes*, 226 W. Va. 103, 697 S.E.2d 139.

In the instant case, the circuit court found that when it imposed the $5,000.00 sanction, it was acting, not according to a specific rule or statute, but rather was exercising its inherent authority to address Attorney Schillace's litigation misconduct. (App., pp. 473-474). It noted Attorney Schillace's failure to properly serve Appellee Judge Jackson with a copy of the summons and amended complaint, as was ordered at the December 11, 2017 hearing, it also relied upon his failure to prepare a proposed order from the December 11, 2017 hearing, and the resulting failure to provide notice to Attorney Dyer to appear for the hearing set for February 28, 2018. (App., p. 540). In addition, Attorney Schillace, although he was present at the December 11, 2017 hearing when the circuit court scheduled the next hearing for February 28, 2018, he himself did not attend the February hearing. (App., p. 540). These specific actions explained by the circuit court provided an objective basis for the imposition of the sanction.

It should be noted that Attorney Schillace's conduct in the instant case was not the only basis for the sanction. Rather, the circuit court recited Attorney Schillace's conduct in seven other cases before it when it imposed the initial sanction. (App. pp. 540-542). The conduct included failing to perform professional duties, such as signing a release, filing necessary pleadings, and attending hearings or ensuring that a hearing

was covered by an attorney with sufficient knowledge of a case and the subject matter of the case. *Id.* Given those identified instances of misconduct, it can be concluded that the circuit court did not err when it imposed the sanction and also required Attorney Schillace to personally cover matters before it, instead of sending an associate, who, in certain instances, had not been sufficiently knowledgeable or familiar with the case to proceed. *Id.*

Appellant Rector has claimed that the circuit court abused its discretion when it dismissed the petition for a writ of prohibition as a sanction because the circuit court had abused its discretion by awarding the sanction in the first place. Appellant Rector's argument, however, fails to take into account that he had over a year from the time that the sanction was originally imposed on March 30, 2018, to the time that it was dismissed at a hearing on August 14, 2019, to either pay the sanction or to challenge the sanction in this Court. Further, the grounds for the sanction involved conduct that was similar to the grounds on which Appellee Judge Jackson issued a sanction -- his failure to appear for a hearing, even though both Appellant Rector and his attorney both had knowledge and notice of the scheduled hearing. This Court has plainly stated that: "The judicial process is designed for seeking the truth, not rewarding gamesmanship." *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 241 W. Va. 335, 351-52, 825 S.E.2d 95, 111-12 (2019). The gamesmanship in which Appellant Rector and/or his counsel have engaged in is evident from a review of the record below, and it justifies the dismissal of the petition for a writ of prohibition as a sanction.

Further, although Attorney Schillace has represented that the circuit court dismissed Count IV of the amended complaint only as a sanction, the record below

indicates that it also dismissed the case on the merits. At the hearing on June 27, 2019, the circuit court warned Attorney Schillace it would dismiss the petition for a writ of prohibition if the sanction was not paid. (App. p. 460). At the next hearing conducted on August 14, 2019, the circuit court noted that it was dismissing the petition for a writ of prohibition as a sanction. (App., pp. 481-482). However, the court also found that the claim was frivolous because the family court had jurisdiction to address the contempt petition after the appeal of the family court order was dismissed and because Attorney Schillace could appeal any adverse result. (App., p. 482). Therefore, Attorney Schillace's claim of error with regard to the dismissal is not supported by the record.

In a similar fact pattern, this Court has upheld an award of attorney fees in the amount of $12,236.33 as a Rule 11 sanction when a circuit court required an attorney to pay the cost of the opposing parties' defense. *Warner v. Wingfield*, 224 W. Va. 277, 685 S.E.2d 250 (2009). In *Warner*, the plaintiffs' deposition showed that they lacked an evidentiary basis for their claim, and plaintiffs' counsel sought to voluntarily dismiss the case. In response, the defendants filed a motion for summary judgment and also for Rule 11 sanctions for the failure of plaintiffs' counsel to properly investigate the case before filing the complaint. To determine whether the sanction was appropriate, this Court reviewed the record and concluded that the plaintiffs' attorney had not met with her clients or had only met with them briefly before filing the complaint. This Court further concluded that: "The entire premise of the civil action appears to be based upon miscommunications or incorrect assumptions, resulting in the filing of an essentially baseless lawsuit . . .." *Warner*, 224 W. Va. at 283, 685 S.E.2d at 256. Based on this reasoning, this Court affirmed the sanction.

In another case, this Court affirmed a sanction when a litigant in a wrongful discharge case had failed to disclose that he had obtained new employment until the first day of trial. *JWCF, LP v. Faruggia*, 232 W. Va. 417, 752 S.E.2d 571 (2013). Although the circuit court did not find any bad faith on the part of the plaintiff or his counsel, the circuit court imposed a sanction of $1,800 against the plaintiff's counsel and a reduction of the jury verdict. *JWCF*, 232 W. Va. at 429-30, 752 S.E.2d at 583-84. On appeal, this Court affirmed the sanction.

The record in the underlying case demonstrates a pattern of negligence or misconduct that affected at least seven other cases in 2018 before this particular circuit court. The findings were noted on the record, and Attorney Schillace has not, by affidavit or other method, shown that the findings were erroneous. Therefore, the imposition of the monetary sanction and the dismissal of the petition for a writ of prohibition are supported by prior cases decided by this Court. See, e.g. *Warner*, 224 W. Va. 277, 685 S.E.2d 25; *JWCF*, 232 W. Va. 417, 752 S.E.2d 571.

Attorney Schillace has relied upon the case of *State ex rel. Askin v. Dostert*, 170 W. Va. 562, 295 S.E.2d 271 (1982) to challenge the sanction issued by the circuit court. The *Askin* case arose when Judge Dostert interfered with a defense attorney's attempt to cross-examine a witness during a criminal trial as it related to the witness' prior statement. Judge Dostert ordered the attorney to post a bond in the amount of $50.00 to ensure his "good behavior" during the rest of the trial. When the attorney refused, Judge Dostert ordered the incarceration of the attorney until he complied. Ultimately, the attorney was released after a four-hour incarceration.

In *Askin*, this Court discussed the statutes, West Virginia Code §§ 30-2-7[3] and-8, and concluded that West Virginia Code § 30-2-8 "is a vestige of earlier times when inferior courts exercised the power to govern the admission and practice of attorneys appearing before them. The statute is not a grant of power by the Legislature to the courts, but rather constitutes an inferential recognition of the power inferior courts possessed at common law to require security in order to prevent the obstruction or interruptions of the administration of justice." *Askin*, 170 W. Va. at 567, 295 S.E.2d at 275. This Court further held that: "The constitutional authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals." Syl. Pt. 1, *Askin*, 170 W. Va. 562, 295 S.E.2d 271.

Although this Court held that it has the constitutional authority to control the practice of law, it further explained that: "circuit court judges are not required to silently tolerate opprobrious conduct on the part of attorneys appearing before them which threatens to obstruct the administration of justice." *Askin*, 170 W. Va. at 567, 295 S.E.2d at 276. As discussed previously, a circuit court, pursuant to its inherent authority, may issue sanctions, including monetary sanctions against an attorney for litigation misconduct. *Richmond Am. Homes*, 226 W. Va. at 113, 697 S.E.2d at 149.

In the instant case, Attorney Schillace has argued that the sanction was impermissibly imposed to ensure his good conduct in the future and that the sanction was prophylactic in nature. However, the circuit court, in its initial imposition of the

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[3] This Court has recognized that:

> "West Virginia Code, 30-2-7 and a circuit court's common-law power to disbar are obsolete and have been superseded by Code, 51-1-4a, By-Laws of the West Virginia State Bar and the Judicial Reorganization Amendment of our Constitution, Article VIII." Syl. Pt. 2, *Carey v. Dostert*, 170 W. Va. 334, 294 S.E.2d 137 (1982).

sanction, identified Attorney Schillace's past conduct in the instant case, *e.g.* failing to serve Appellee Judge Jackson, failing to prepare an order from the December 11, 2017 hearing, and failing to attend the February 28, 2018 hearing. It also noted *past* misconduct in seven other cases over which the circuit court was presiding. The transcript of the March 30, 2018 hearing fails to support Appellant Rector's argument about the nature of the sanction. (App., pp. 540-543). The sanction imposed by the circuit court was, therefore, an appropriate exercise of its inherent authority to regulate the proceedings before it, not a bond to ensure Attorney Schillace's good conduct in the future.

Appellant Rector further argues that the circuit court abused its discretion in imposing the original sanction and the additional $50.00 per day sanction because he did not receive notice that the sanction would be addressed at the subsequent hearings. However, the order issued after the February 28, 2018 hearing included a rule to show cause against Attorney Schillace for his failure to prepare the order from the December 11, 2017 hearing, his failure to serve Appellee Judge Jackson with the amended complaint, and his failure to appear at the February 28, 2018 hearing. (App., p. 133). Further, the order was personally served upon him. The record demonstrates that Attorney Schillace received notice that the circuit court would be addressing his misconduct in advance of the March 30, 2018 hearing. Therefore, Attorney Schillace's claim of lack of notice with regard to the March 30, 2018 hearing is simply not supported by the record.

With regard to the July 13, 2018 hearing, it should be noted that the first issue that the circuit court addressed was the failure of Attorney Schillace to submit the order

from the December 11, 2017 hearing. Since this issue had already been noticed for consideration at the March 30, 2018 hearing, it is safe to assume that the continued failure to rectify this problem would be addressed at subsequent hearings in this case.

Further, Attorney Schillace argues that he did not receive notice that the circuit court would continue to address the $5,000.00 sanction at further hearings. This argument, however, is not supported by the record because the circuit court plainly told Attorney Schillace at the July 13, 2018 hearing that the sanction needed to be paid before it would address the modification of the sanction. (App., p. 247). Presumably, the circuit court meant the sanction needed to be paid before it would address Attorney Schillace's motion of April 9, 2018, or a stay from this Court would have to be established. It is undisputed that Attorney Schillace did not take either of these two courses of action before the end of the case: either compliance with the order or challenging the order through an appeal or a petition for an extraordinary writ with an accompanying motion for stay.

It is undisputed that over a year had passed from the date of the initial sanction announced in court on March 30, 2018 and imposed by written order on June 5, 2018, until the date of the final hearing on August 14, 2019, and Attorney Schillace had not deposited the funds or sought a stay from this Court. According to Attorney Schillace's reasoning, a party or attorney could continue to flout reasonable orders of a court, even though a court, on the record, indicates that an order must be complied with or must be subject to a stay granted by this Court. Therefore, it can be concluded that the circuit court provided proper notice to Attorney Schillace, and it did not abuse its discretion

when it continued to address Attorney Schillace's failure to pay the sanction at subsequent hearings.

As another basis to challenge the sanction, Attorney Schillace has argued that the imposed sanctions run afoul of West Virginia Code § 61-5-26[4], a statute that limits the summary imposition of contempt sanctions. However, the circuit court did not issue its initial sanction of $5,000.00 until a rule to show cause had been served on Attorney Schillace. (App., pp. 132-135). Therefore, this sanction was *not* imposed in a summary manner. Further, the circuit court notified Attorney Schillace on the record on June 27, 2019, that it would impose an additional $50.00 per day sanction until the amount of $5,000.00 was posted with the clerk. (App., p. 464). The additional amount was not imposed until the court conducted another hearing approximately a month and a half later. The record below plainly indicates that the imposed sanction was not issued in a summary manner, and therefore, West Virginia Code § 61-5-26 does not bar the sanction that was imposed by the circuit court.

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[4] West Virginia Code § 61-5-26 provides that:

> The courts and the judges thereof may issue attachment for contempt and punish them summarily only in the following cases: (a) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice; (b) violence or threats of violence to a judge or officer of the court, or to a juror, witness, or party going to, attending or returning from the court, for or in respect of any act or proceeding had, or to be had, in such court; (c) misbehavior of an officer of the court, in his official character; (d) disobedience to or resistance of any officer of the court, juror, witness, or other person, to any lawful process, judgment, decree or order of the said court. No court shall, without a jury, for any such contempt as is mentioned in subdivision (a) of this section, impose a fine exceeding $50, or imprison more than ten days. But in any such case the court may impanel a jury (without an indictment or any formal pleading) to ascertain the fine or imprisonment proper to be inflicted, and may give judgment according to the verdict. No court shall impose a fine for contempt, unless the defendant be present in court, or shall have been served with a rule of the court to show cause, on some certain day, and shall have failed to appear and show cause.

Furthermore, the circuit court explained on the record that it was not issuing a contempt sanction when it imposed the $5,000.00 sanction, but rather was sanctioning Attorney Schillace for his misconduct pursuant to its inherent authority to control proceedings before it. See *Richmond Am. Homes*, 226 W. Va. 103, 697 S.E.2d 139. The inherent authority to sanction parties and attorneys is separate from the imposition of a contempt sanction. Therefore, Attorney Schillace's claim that West Virginia Code § 61-5-26 bars the imposition of either of the sanctions mischaracterizes the findings made by the circuit court concerning the sanction and the procedures followed by the circuit court before it imposed the sanction. The record below plainly shows that Attorney Schillace was afforded notice and the opportunity to be heard before it imposed the sanctions.

C. Appellant Rector's Claim That the Family Court Lacked Jurisdiction Mistakenly Conflates Modification of an Order with Enforcement of an Order.

Appellant Rector has argued that Appellee Judge Jackson had no jurisdiction to address the contempt petition (or even allow it to be filed) because the *Decree of Divorce* had been appealed. Certainly, an inferior or trial court has no jurisdiction to modify a final order while an appeal is pending. *State v. Doom*, 237 W. Va. 754, 791 S.E.2d 384 (2016). However, the issue addressed by the contempt petition was the *enforcement* of a provision of the final order that had not been appealed, not the *modification* of the order.

This Court has recognized that enforcement of a final order may occur while an appeal is pending. *Zachary G. v. State*, Case No. 15-1143 (W. Va. Supreme Court, June 9, 2017) (memorandum decision), 2017 W. Va. Lexis 466. In *Zachary G.*, a

defendant had appealed his conviction for third degree sexual assault. At sentencing, the defendant was placed at the Anthony Center. Upon his completion of this program, his sentence was suspended, he was placed on a five-year probationary period, and he was also subject to an additional five-year period of supervised release. See W. Va. Code § 62-12-26. Once he registered as a sex offender after his release, he was no longer allowed to reside at a homeless shelter. In turn, the defendant was incarcerated, but was released during the day to seek employment and participate in other services. He did not, however, check in with his intensive supervision probation officer as he had been directed. After several hearings, the defendant's supervised release was revoked, and he was ordered to serve a determinate term of five years in the penitentiary.

As one basis for his appeal, the defendant argued that the circuit court lacked jurisdiction to enforce the final order because it had been appealed. The defendant relied upon *Fenton v. Miller*, 182 W. Va. 731, 391 S.E.2d 744 (1990) and *Doom*, 237 W. Va. 754, 791 S.E.2d 384, the same cases upon which Appellant Rector relies. This Court, however, rejected the argument and held that "the circuit court retained its authority to hear matters of executing and effectuating revocations of probation or supervised release." *Zachary G.*, 2017 Lexis at 14-15. This Court relied upon *Berman v. United States*, 302 U.S. 211, 213, 58 S. Ct. 164 (1937) which found that a final judgment for appeal is distinct from the execution of a sentence. Based upon this reasoning, it can be concluded that the family court did not lose jurisdiction to address the contempt petition.

The conclusion -- that the family court could have enforced portions of the *Decree of Divorce* -- is also supported by Rule 27 of the West Virginia Rules of Practice

and Procedure for Family Court (hereinafter "Family Court Rules"). In the relevant parts, Rule 27[5,6] of the Family Court Rules indicates a family court or circuit court may stay all or part of an order, but may not stay an order that provides for payment of spousal support or child support. Under the terms of Rule 27 of the Family Court Rules, it can be concluded, therefore, that the execution of specified provisions of a family court order may be enforced before a decision is rendered on appeal. Similar to the circumstances in *Zachary G.*, the issue presented in the contempt petition was *enforcement* of the final order, not a *modification* of the final order.

Under the Family Court Rules, a family court is to conduct a hearing on either a modification or contempt petition within 45 days or dismiss the petition within 20 days if the court determines that a hearing is not warranted. W. Va. R. Prac. & Pro. Family Ct. 21(a)[7]. Rule 21, therefore, imposes a duty on family courts to address contempt petitions within specified time frames. Since the guardian *ad litem* for Ms. Ross had filed two contempt petitions, it was Appellee Judge Jackson's duty and responsibility to address this matter.

The record in the case below indicates that a stay was not entered until the afternoon of May 1, 2017. Therefore, Appellee Judge Jackson had jurisdiction to

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[5] When a party requests a stay from the family court, "the family court may order a stay of all or part of a final order, for the period of time allowed for filing of a petition for appeal to the circuit court or for any additional period of time pending disposition of the appeal." W. Va. R. Prac. & Pro. Family Ct. 27(b).

[6] If a party seeks a stay from circuit court, "[t]he circuit court may order a stay of all or part of a final order, for the period of time allowed for filing of a petition for appeal to the circuit court, or for any additional period of time pending disposition of the appeal." W. Va. R. Prac. & Pro. Family Ct. 27(c).

[7] The relevant subsection of Rule 21 provides that: "A party may file a petition for contempt/order to show cause or modification of any order of the court. If grounds pled warrant a contempt/show cause and modification hearing, the hearing shall take place within 45 days of the filing of a petition for contempt/order to show cause or modification. If grounds pled not warrant a hearing then the court shall enter a dismissal order within 20 days." W. Va. R. Prac. & Pro. Family Ct. 21(a).

address the contempt petition when it was originally filed and when it began the hearing on May 1, 2017, at 9:00 a.m. Further, the record in the underlying case indicates that whether the stay prevented Appellee Judge Jackson from addressing the contempt petition was an open question on May 2, 2017. Until the circuit court clarified that the stay applied to all matters, including the contempt petition, in its June 2, 2017 order (App., pp. 414-421) it was, at best, unclear whether Appellee Judge Jackson had jurisdiction to address the contempt petition. By the express terms of the order, the circuit court even found that the original order establishing the stay needed to be clarified. (App., p. 419). The circuit court further stated that: "This Court makes no finding that the Family Court Judge violated the May 1, 2017 Order due to the lack of clarity in the order." (App., p. 419). This lack of clarity supports the conclusion that the Harrison County Family Court had jurisdiction to address the contempt petition on May 2, 2017.

Appellant Rector has further argued that Appellee Judge Jackson could not address the contempt petition after the appeal was dismissed by this Court because the June 2, 2017 order had never been appealed or modified.[8] This argument, however, ignores the terms of the stay. The stay that was established by the circuit court was a stay that was in effect *pending the appeal.* (App., pp. 414-421). Once the appeal was dismissed upon Appellant Rector's motion, there was no order that prevented Appellee Judge Jackson from conducting a hearing on the rule to show cause that was issued against Appellant Rector and Attorney Schillace. Therefore, the circuit court correctly

[8] The law-of- the-case doctrine relied upon by Appellant Rector does not apply to Appellee Judge Jackson because she was not a party in privity to the June 2, 2017 order. See *Mullins v. Green*, 145 W. Va. 469, 115 S.E.2d 320 (1960); *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003).

made this finding in its *Order Granting Judgment and Dismissing Petition for Writ of Prohibition* entered on October 16, 2019. (App., pp. 486-490).

D. The Alleged Lack of Jurisdiction Does Not Excuse Appellant Rector or Attorney Schillace for Their Failure to Appear at the May 2, 2017 Hearing.

In his brief, Appellant Rector, by counsel, argues that Appellee Judge Jackson had no jurisdiction to schedule the May 1, 2017 hearing on the contempt petitions filed by the guardian *ad litem* for Ms. Ross. Therefore, he is, in effect, arguing that the alleged lack of jurisdiction excuses his lack of appearance for the May 2, 2017 hearing before Appellee Judge Jackson on this particular matter. This argument, however, glosses over the basic way to challenge jurisdiction. Specifically, a preliminary question for any court is whether it has subject matter jurisdiction over a case before it. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453, 20 S. Ct. 690, 691-92 (1900). Therefore, the lawfully established methods to challenge jurisdiction are to raise the objection before the trial court and appeal any adverse decision or to seek a petition for an extraordinary writ -- not to simply fail to appear for a hearing that had been scheduled, as Appellant Rector and his attorney chose to do. Appellant Rector and his counsel could have appeared at the hearing, and they could have continued to assert the jurisdictional arguments at the May 2, 2017 hearing. They could have argued that the stay issued by the circuit court indicated that the contempt proceedings could not continue. However, they, instead, unilaterally decided not to appear.

The relevant statutes governing family courts in West Virginia provide additional support for Appellee Judge Jackson's actions in issuing a rule to show cause for their failure to appear. Specifically, West Virginia Code § 51-2A-9(a)[9] has established the

[9] West Virginia Code § 51-2A-9(a) provides that:

contempt powers of a family court. With specific relevance to the instant case, the applicable statute provides that a family court judge may:

> (2) Regulate all proceedings in a hearing before the family court judge; and
> (3) Punish direct contempts that are committed in the presence of the court or that obstruct, disrupt or corrupt the proceedings of the court. W. Va. Code § 51-2A-9(a).

Not only does a family court have contempt powers as established by West Virginia Code §§ 48-1-304 and 51-2A-9, the West Virginia Legislature has further delineated the power and authority of a family court. W. Va. Code § 51-2A-7(a).[10] Of relevance to this case, the statute expressly establishes that a family court has the authority to:

> (1) Manage the business before them; . . ..
> (5) Discipline attorneys;
> (6) Prevent abuse of process . . .. W. Va. Code § 51-2A-7(a).

> (a) In addition to the powers of contempt established in chapter forty-eight of this code, a family court judge may: 1) Sanction persons through civil contempt proceedings when necessary to preserve and enforce the rights of private parties or to administer remedies granted by the court; (2) Regulate all proceedings in a hearing before the family court judge; and (3) Punish direct contempts that are committed in the presence of the court or that obstruct, disrupt or corrupt the proceedings of the court.

[10] In relevant part, West Virginia Code § 51-2A-7(a) states that:

> The family court judge will exercise any power or authority provided in this article, in chapter forty-eight of this code or as otherwise provided by general law. Additionally, the family court judge has the authority to: (1) Manage the business before them; (2) Summon witnesses and compel their attendance in court; (3) Exercise reasonable control over discovery; (4) Compel and supervise the production of evidence, including criminal background investigations when appropriate; (5) Discipline attorneys; (6) Prevent abuse of process; and (7) Correct errors in a record.

Although Appellant Rector argues that Appellee Judge Jackson lacks jurisdiction to conduct a hearing based upon Appellant Rector and his counsel's non-appearance at the May 2, 2017 hearing, the stay entered by the circuit court was not clear, as demonstrated by the subsequent order that clarified the terms of the stay. (App., pp. 414-421). Because the original stay only appeared to address issues subject to the appeal, it is reasonable to conclude that the stay did not relieve Appellant Rector or his counsel from appearing on May 2, 2017. Further, the lack of specificity in the order is critical because Rule 27 of the Family Court Rules indicate that "the circuit court may order a stay of *all or part* of a final order . . .." W. Va. R. Prac. & Pro. Family Ct. 27(c) (emphasis added). On May 1 and 2, 2017, it was an open question whether the stay would excuse Appellant Rector and his counsel's undisputed failure to appear.

The issue of failing to appear is important, because, as noted previously, a family court judge has the power to punish direct contempts that disrupt or corrupt the proceedings of the court. W. Va. Code § 51-2A-9(a). Similarly, West Virginia Code § 51-2A-7(a) authorizes family courts to manage the business before them and to discipline attorneys when necessary. Although an unexcused failure to appear may not be the most disrespectful action a party or counsel could take, it certainly demonstrates a significant level of disrespect to Appellee Judge Jackson. Given both the statutory contempt powers of a family court judge and the lack of clarity of the order establishing a stay with regard to the contempt proceedings, it can be concluded, therefore, that Appellee Judge Jackson had jurisdiction to address the non-appearance of Appellant Rector and his counsel at the May 2, 2017 hearing.

V. CONCLUSION

Despite the various arguments raised by counsel for Appellant Rector, the circuit court correctly acted according to its inherent authority when it imposed the initial sanction based upon both the record in the instant case and in seven other cases before it. The circuit court only imposed an additional amount after Appellant Rector's counsel had over a year to comply with the order or to lawfully challenge the order in this Court. Appellant Rector's second allegation of error-- that the Harrison County Family Court lacked jurisdiction over a contempt petition -- erroneously mixes the concept of the modification of an order with the enforcement of an order, a distinction that has been recognized by this Court. Further, the lack of jurisdiction alleged by Appellant Rector and his counsel fails to justify their unilateral decision not to attend the hearing on May 2, 2017, a hearing of which they unmistakably had notice. The record below and applicable legal authority indicates, unmistakably, that neither the circuit court, nor the Harrison County family court erred with regard to the proceedings before them.

WHEREFORE, Appellee Judge Jackson, by counsel Teresa Lyons, respectfully requests that this Court affirm the *Order Granting Judgment and Dismissing Petition for Writ of Prohibition* and award any further relief that this Court finds is just and equitable.

THE HONORABLE LORI B. JACKSON
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CERTIFICATE OF SERVICE

I, Teresa J. Lyons, do hereby certify that I served a true and correct copy of the foregoing *Response Brief of Appellee Judge Jackson* by U.S. First Class Mail, postage prepaid, this 30th day of March 2020, upon the following:

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